No. 90-974

In The

Supreme Court of the United States

October Term, 1990

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.

and

JESSE OLIVER, ET AL.,

Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Does Section 2 of the Voting Rights Act, 42 U.S.C. 1973, apply to dilution claims in judicial election systems?

LIST OF PARTIES

Plaintiffs:

League of United Latin American Citizens (Statewide)
LULAC Local Council 4434
LULAC Local Council 4451
Christina Moreno
Aquilla Watson
Joan Ervin
Matthew W. Plummer, Sr.
Jim Conley
Volma Overton
Gene Collins
Al Price
Judge Mary Ellen Hicks
Rev. James Thomas

Plaintiff-Intervenors:

Harris County:

Houston Lawyers' Association
Alice Bonner
Weldon Berry
Francis Williams
Rev. William Lawson
DeLoyd T. Parker
Bennie McGinty

Dallas County:

Jesse Oliver
Fred Tinsley
Joan Winn White

Defendants:

William P. Clements, Governor, State of Texas (dismissed prior to trial)
Jim Mattox, Attorney General of Texas
(Dan Morales, successor in office)
George Bayoud, Secretary of State

LIST OF PARTIES – continued

(John Hannah, Jr., successor in office)
Texas Judicial Districts Board
Thomas R. Phillips, Chief Justice, Texas Supreme Court
Mike McCormick, Presiding Judge, Court of Criminal Appeals
Ron Chapman, Presiding Judge, 1st Admin. Judicial Region
(Pat McDowell, successor in office)
Thomas J. Stovall, Jr., Presiding Judge, 2nd Admin. Judicial Region
James F. Clawson, Jr., Presiding Judge, 3rd Admin. Judicial Region
(B. B. Schraub, successor in office)
John Cornyn, Presiding Judge, 4th Admin. Judicial Region
Robert Blackmon, Presiding Judge, 5th Admin. Judicial Region
(Darrell Hester, successor in office)
Sam B. Paxson, Presiding Judge, 6th Admin. Judicial Region
(William E. Moody, successor in office)
Weldon Kirk, Presiding Judge, 7th Admin. Judicial Region
Jeff Walker, Presiding Judge, 8th Admin. Judicial Region
Ray D. Anderson, Presiding Judge, 9th Admin. Judicial Region
Joe Spurlock II, President, Texas Judicial Council
Leonard E. Davis

Defendant-Intervenors:

Judge Sharolyn Wood (Harris County)

Judge Harold Entz (Dallas County)

Bexar County:

Judge Tom Rickoff
Judge Susan D. Reed

LIST OF PARTIES – continued

Judge John J. Specia, Jr.
Judge Sid L. Harle
Judge Sharon Macrae
Judge Michael D. Pedan

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ATTORNEY GENERAL OF TEXAS, ET AL.,

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On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONERS

Petitioners, the League of United Latin American Citizens, et al., and Jesse Oliver, et al., pray that the decision of the United States Court of Appeals for the Fifth Circuit, *en banc*, be reversed.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Texas has not been reported, but is included in the Appendix.[1] (Pet. App., pp. 183a-304a.) The opinion of a panel of the United States Court of Appeals for the Fifth Circuit is reported at 902 F. 2d 293 (5th Cir. 1990). The order granting rehearing en banc (sua sponte) is reported at 902 F. 2d 322 (5th Cir. 1990). The opinion of the United States Court of Appeals for the Fifth Circuit, *en banc*, is reported at 914 F. 2d 620 (5th Cir. 1990). (Pet. App., pp. 1a-182a.)

JURISDICTION

The judgment of the Court of Appeals was entered on September 28, 1990. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. 1254(1). Petition for Certiorari was docketed in this Court on December 14, 1990. *Certiorari* was granted by this Court on January 18, 1991.

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[1] All references to the Appendix refer to the Petitioners' Appendix (Pet. App.) filed in No. 90-813, Houston Lawyers' Assn., et al. v. Jim Mattox, et al., with the Petition for Writ of Certiorari, which was granted on January 18, 1991, and consolidated with this case for argument. These documents reproduced there are not reproduced in the Joint Appendix, pursuant to Rule 26.1.

STATUTES INVOLVED

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, as amended, provides as follows:

> (a) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Section 4 of the Voting Rights Act of 1965, 42 U.S.C. 1973b(f)(2), provides, in pertinent part, as follows:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any

citizen of the United States to vote because he is a member of a language minority group.

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, provides, in pertinent part, as follows:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the first sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the second sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the third sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), and unless and until the court enters such judgment no person

shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced with out such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with the section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provision of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

STATEMENT OF THE CASE

The Proceedings Below

This is a voting rights case brought by black and Hispanic citizens of and organizations within the State of Texas. On July 11, 1988, suit was filed in the United States District Court for the Western District of Texas under Section 2 of the Voting Rights Act, 42 U. S. C. 1973, and under 42 U. S. C. 1983, alleging violations of the Fourteenth and Fifteenth Amendments to the United States Constitution. Jurisdiction below was based upon 28 U. S. C. 1331.

At issue is the use of at-large elections in majority white judicial districts used to elect district judges.[2] The districts are contained within ten of Texas' 254 counties: Harris, Dallas, Bexar, Tarrant, Travis, Lubbock, Crosby, Midland, Ector, and Jefferson.

After a trial to the Court, the district judge entered findings of fact and conclusions of law, and found a violation of Section 2 of the Voting Rights Act in all ten counties. (Pet. App., at pp. 183a-304a.)[3]

In each county challenged, the trial court found for plaintiffs on each of the threshold *Gingles* factors, *Thornburg v. Gingles*, 478 U. S. 30 (1986):

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[2] In Texas, the trial court of general jurisdiction is the district court. *Texas Constitution*, Art. 5, Sec. 8.

[3] The Court did not find that the 1985 Amendment to the Texas Constitution allowing less than countywide judicial districts, if split by local referendum, was motivated by discriminatory intent. (Pet. App., at pp. 282a-283a; 301a-302a.) The Constitutional issue was not appealed by any party.

- the minority group was sufficiently concentrated so as to constitute a voting age majority in a single-member district, (Pet. App., at pp. 200a-209a), and
- the minority group voted cohesively, (Pet. App., at pp. 210a-275a), and
- a white voting bloc usually defeated the choice of the minority voters. (Pet. App., at pp. 210a-275a.)

In addition, the trial court found that voting in these counties was racially polarized, (Pet. App., at pp. 210a-275a), and that there was a lack of success of minority candidates. (Pet. App., at pp. 279a-281a.) As required, it made findings regarding the "typical factors," (Pet. App., at pp. 273a-285a) as discussed in the *Senate Report*, No. 97-417, 97th Congress 2d Sess., reprinted in 1982 *U. S. Code Cong. & Admin. News* at pp. 177 et seq., which is a part of the legislative history of the 1982 amendments to the Voting Rights Act. The district court found a history of discrimination against Blacks and Hispanics. The legacy of that discrimination is exhibited in a lower socio-economic status of both groups. (Pet. App., at pp. 273a-275a.) It found that the election scheme is a numbered post system; that there is a majority vote requirement, and that the size of five of the counties enhance the problems of minorities when they seek office. (Pet. App., at pp. 275a-277a.) The court noted racial appeals in elections in Dallas County. (Pet. App. at p. 278a.)

Finally, based upon the "totality of the circumstances," the trial court found that minority voting strength was diluted in each of the ten counties. (Pet. App., at pp. 297a-301a.)

Although given an opportunity, the Texas Legislature failed to remedy the discriminatory at-large election system. Therefore, on January 2, 1990, the trial court enjoined further use of the at-large electoral system in these counties. Pursuant, in part, to an agreement between the plaintiffs and the Attorney General for the State of Texas, it ordered an interim election plan under which the counties were subdivided into election districts coincident with existing electoral boundaries for state representatives, or county commissioners, or justices of the peace.[4]

Acting upon emergency motions to stay, on January 11, 1990, the United States Court of Appeals for the Fifth Circuit stayed this interim plan pending appeal. On May 11, 1990, a panel of that court reversed the district court, holding 2-1 that at-large elections for trial judges are not covered by Section 2 of the Voting Rights Act. 901 F. 2d 293 (5th Cir. 1990). Four days later, pursuant to a majority vote of the active judges, the court ordered a rehearing *en banc*. On September 28, 1990, the *en banc* court reversed the trial court in a severely split opinion. 914 F. 2d 620 (5th Cir. 1990). (Pet. App., at pp. 1a-182a.)

The majority opinion, written by Judge Gee, 914 F. 2d 622-631, (Pet. App., at pp. 1a-35a), held that even though an intentional discrimination claim could be maintained for judicial elections under the Fourteenth and Fifteenth

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[4] On its own the district court ordered that elections be non-partisan even though Texas law is to the contrary. Neither party had requested non-partisan elections. The issue is not before this Court. If necessary, it may be considered on remand.

Amendments to the United States Constitution, and even though Section 5 of the Voting Rights Act applies to judicial elections, and even though some elements of Section 2 apply to judicial elections, the amended Section 2 of the Voting Rights Act which incorporates a "results test" does not allow a vote dilution claim against a judicial election system, regardless of how discriminatory it may be.[5] Their result was based upon their interpretation of the word "representatives" which was utilized in the 1982 amendment to Section 2. The full court specifically overruled the circuit's prior opinion to the contrary, *Chisom v. Edwards*, 839 F. 2d 1056 (5th Cir. 1988), *cert. denied sub nom. Roemer v. Chisom*, 109 S. Ct. 390 (1988).[6]

One concurring opinion, written by Judge Higginbotham, 914 F. 2d 634-651, (Pet. App., at pp. 47a-114a), followed the panel opinion in *LULAC* and said that although Section 2 of the Voting Rights Act covers elections for appellate judges, it does not cover elections for trial judges.

The dissent, written by J. Johnson, (Pet. App., at pp. 115a-182a), author of the *Chisom* opinion, strongly urged that all sections of the Voting Rights Act apply to all

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[5] The findings of the district court, (Appendix, at pp. 183a-304a), unaddressed on appeal, establish that minority voters in the targeted Texas counties are unable to elect judges of their choice.

[6] *Chisom v. Roemer*, as the case is now called, is also before this Court on Writ of Certiorari, No. 90-797. *Chisom* involves the Louisiana Supreme Court. *LULAC* involves Texas trial judges.

elected officials, including judges, and stressed the need to remedy the minority vote dilution proved at trial. The dissent characterized the majority opinion as "dangerous" and a "burning scar on the flesh of the Voting Rights Act." (Pet. App., at p. 116a.)

Statement of Facts

Judicial districts are created by statute. District judges are elected in the challenged areas in partisan elections, but each judicial candidate must file for a specific position designated by a numbered post. Each of the challenged judicial districts is countywide, with the exception of the 72nd Judicial District, which covers two counties.[7]

Qualifications for office are set by the Texas Constitution. *Texas Const.*, Art. 5, Sec. 7. To become the party nominee for a numbered judicial post, a candidate must receive a majority of the votes cast, *Texas Elec. Code*, Sec. 172.003; however, in the general election, a plurality determines the winner. *Texas Elec. Code*, Sec. 2.001. A district judge's term is four years, and the terms are staggered in multi-judge counties.

Although a district judge usually sits in the county from which he or she is elected, jurisdiction of any district court is statewide. *Nipper v. U-Haul Co.*, 516 S.W.2d 467, 470 (Tex. Civ. App. 1974). A system of "visiting judges," authorized by statute, allows retired judges to

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[7] The Texas Constitution allows judicial districts to be smaller than a county if authorized by a majority of the voters in the county. *Texas Const.*, Art. 5, Sec. 7a(i).

fill-in for elected judges when docket conditions require. *Texas Government Code*, Ch. 75.101. Aspects of any particular case may be heard by any other judge depending upon the docketing system in use.

Venue is determined by a complex set of statutes. *Texas Civil Practice & Remedies Code*, Ch. 15.

Minority electoral success has been minimal. The district court's findings detail the difficulty minority voters have electing candidates of choice in each of the challenged judicial districts. (Pet. App., at pp. 279a-281a.) Harris County provides a typical example. Even though the population is nearly 20% black, only 3 of the 59 district court judges are black. Because of racially polarized voting in the majority white countywide election district, black candidates have won only two of seventeen contested judicial elections against white candidates. (Pet. App., at p. 279a.) In a few counties, no minority has ever run because the at-large election system made "chance of success so slim." (Pet. App., at pp. 279a-280a.)

SUMMARY OF THE ARGUMENT

The *en banc* decision of the Fifth Circuit conflicts with decisions of this Court in *Haith v. Martin*, 618 F. 2d 410 (E. D. N. C. 1985), *aff'd mem.*, 477 U. S. 901 (1986), and *Brooks v. Georgia State Board of Elections*, (S. D. Ga. 1989), *aff'd mem.*, 111 S. Ct. 288 (1990). These recent decisions establish that Section 5 of the Voting Rights Act applies to judicial elections. The circuit majority attempts to distinguish between Section 5 and Section 2 coverage by a

restrictive interpretation of the word "representatives" in the amended Voting Rights Act to exclude the judiciary.

The legislative history of the act refers to judicial elections and does not specifically exclude them. In addition, the words "representatives," "candidate," and "elected officials" are used interchangeably throughout the history. Section 5 of the Act admittedly applies to judicial elections. The very terms of both Sections 2 and 5 of the Act proscribe "any voting qualification or prerequisite to voting, or standard, practice, or procedure" which results in discrimination. Coverage of the two sections is the same. In addition, "voting" is defined as being "with respect to candidates for public . . . office . . . " Judges are certainly candidates for public office.

The Attorney General has consistently interpreted the Voting Rights Act as applicable to all judicial elections.

The *en banc* majority argues that vote dilution cases are based upon the one-person, one-vote principle, and that since this principle does not apply to the judiciary, then there is no basis for a vote dilution claim. This argument confuses quantitative and qualitative vote dilution claims. Even the reasoning of the majority is flawed since they acknowledge that a constitutional claim of vote dilution may lie against a judicial election scheme. The Voting Rights Act is intended to eliminate racial discrimination in voting without regard to numerical equality.

The concurrence written by J. Higginbotham is no less dangerous to the elimination of racial discrimination in voting. They create out of whole cloth a "single-office holder" exception to coverage of the Voting Rights Act.

Based upon a misreading of *Butts v. City of New York*, 779 F. 2d 141 (2d Cir. 1985), they would hold that a trial judge is a sole decision maker and therefore his office is not subject to being subdivided. They err in that the focus of the Voting Rights Act is upon the voter, not upon the function of the elected official. The proper determination of a single-office is based upon geography, not function. If there is only one sheriff in the county, for example, then that office cannot be subdivided. Even if one accepted the existence of a single-office holder exception, it does not apply to the Texas trial judiciary since many judges are elected from any one county: 59 in Harris County. The jurisdiction of any district court is statewide. All district judges in Texas have identical powers and they often sit for each other on the same case.

By focusing upon the function of the judicial office, the concurrence has placed remedy considerations as a bar to liability. A proper analysis under *Thornburg v. Gingles*, 478 U. S. 30 (1986) requires a threshold analysis, followed by a consideration of the "totality of the circumstances" to determine if minority voting strength is being diluted. The concurrence argues that the state's interest in at-large elections and responsiveness, minor factors in a dilution analysis, outweigh eliminating any proved minority vote dilution of the electoral system.

The effect of both the majority and concurring opinion is to frustrate the purposes of the Voting Rights Act to rid the country of discrimination in voting.

ARGUMENT

I.

Section 2 of the Voting Rights Act Covers Judicial Elections

1. Supreme Court Interpretation: Section 5 and Section 2.

Despite its contention to the contrary, the *en banc* decision of the Fifth Circuit conflicts with the decisions of this Court in *Haith v. Martin*, 618 F. 2d 410 (E. D. N. C. 1985), *aff'd mem.*, 477 U. S. 901, 106 S. Ct. 3268, 91 L. Ed. 2d 559 (1986), and most recently, *Brooks v. Georgia State Board of Elections*, Civ. No. 288-146 (S. D. Ga. 1989), *aff'd mem.*, 111 S. Ct. 288 (1990). Both decisions hold that Section 5 of the Voting Rights Act applies to judicial elections.

The majority opinion of the *en banc* Fifth Circuit does not dispute the *Haith* decision. Also it asserts that some portions of Section 2 may apply to the judiciary. Nevertheless, it holds that the "results test introduced in response to the holding in *Bolden* to govern vote dilution in the election of 'representatives,' . . . by its own terms does not" apply to the judiciary. 914 F. 2d at 629. (Pet. App., at p. 29a.) As pointed out by both Judge Higginbotham's concurrence, 914 F. 2d at 638-642, (Pet. App., at pp. 62a-79a), and Judge Johnson's dissent, 914 F. 2d at 655-659, (Pet. App., at pp. 129a-140a), the majority constricts the coverage of Section 2 by placing an unwarranted restriction upon the word "representatives." This reading disregards the purposes of the Voting Rights Act.

This Court affirmed the holding in *Haith v. Martin*, 618 F. Supp at 413, that " . . . the Act applies to all *voting* without any limitation as to who, or what, is the object of the vote." (Emphasis in original.)

If the Fifth Circuit's decision is not reversed, then changes in judicial election procedures could be prohibited under Section 5, but those identical practices could not be eliminated under Section 2. Such an anomaly cannot be within the firm intent of Congress that the Voting Rights Act of 1965 "rid the country of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U. S. 301, 315 (1966).

Haith and *Brooks* hold that Section 5 of the Voting Rights Act applies to judicial elections. The proscribed practices covered by Section 2 and Section 5 are the same: any "voting qualification or prerequisite to voting, or standard, practice, or procedure . . . . " Given the identical language in Sections 2 and 5, basic tenets of statutory construction require that the sections be given identical meaning. *Pampanga Mills v. Trinidad*, 279 U. S. 211, 217-218 (1929); *Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427, 433 (1932).

The two sections of the Act work in tandem. The distinction between them relates to whether a voting practice may be continued or may be implemented, not to their application to various election systems. Congress specifically stated, *House Report No. 97-227*, at 28, that

> . . . under the Voting Rights Act, whether a discriminatory practice or procedure is of recent origin affects only the mechanism that triggers relief, i. e., litigation or preclearance. The lawfulness of such a practice should not vary depending upon when it was adopted, i. e., whether it is a change.

The legislative history of the 1982 amendments to the Voting Rights Act specifically stated that any voting practice subject to Section 5 would also be subject to Section 2.[8] To draw a distinction in coverage between Section 2 and 5 is to seek a distinction in the legislative history that does not exist.

2. Language of the Act and Legislative Intent.

In addition to ignoring this Court's interpretation of the Voting Rights Act, the action of the Fifth Circuit is contrary to the will of Congress, as expressed in the legislative history and reaffirmed by this Court, that the Act have the "broadest possible scope." *Allen v. State Board of Elections*, 393 U. S. 544, 566-567 (1969).

The very words of the Act require that judicial election schemes be included within its reach. Section 14(c)(1) defines "voting" and described the practices that are included within the realm of the Act:

> The terms "vote" and "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

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[8] The United States Attorney General's implementation of Section 5 now incorporates Section 2 standards. 28 *CFR* 51.55(b)(2).

Judges in Texas are indisputably "candidates for public . . . office." The Fifth Circuit's conclusion that the word "representatives" was intended to exclude judges is inconsistent with a reading of the Act as a whole and with its purposes. As Judge Johnson pointed out in his dissent, the Fifth Circuit majority reaches an "absurd and inconsistent result." 914 F. 2d at 654, (Pet. App., at 123a.) Discrimination would be prohibited in all elections, *except judicial elections*.

In 1982, Congress amended and strengthened the Act in response to this Court's decision in *Mobile v. Bolden*, 446 U. S. 55 (1980), which required a finding of discriminatory intent to prove a vote dilution case. It is inconceivable that Congress, while trying to strengthen Section 2, would at the same time have excluded from its reach an entire category of elections without someone saying so in the extensive legislative debates, the committee hearings, or the committee reports. No one did.

Given the references in the 1982 legislative history to judges, it is difficult to believe that Congress intended to exclude judges from the coverage of the amended Section 2.[9] Basic to an understanding of the purpose and scope of

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[9] *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 38, 193, 239, 280, 503, 574, 804, 937, 1182, 1188, 1515, 1745, 1839, 2647 (1981); *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 669, 748, 788-789 (1982).

the Act is its focus upon the *voter*, not the *elected official*.[10] "The Act is, after all, the *Voting Rights* Act." J. Johnson, dissenting. 914 F. 2d 655, (Pet. App., at 128a.)

3. Interpretation by the Attorney General.

As this Court noted in *United States v. Sheffield Board of Commissioners*, 435 U. S. 110, 131 (1978), interpretation of the Voting Rights Act by the Attorney General is compelling evidence of the Act's meaning, "especially in light of the extensive role the Attorney General played in drafting the statute and in explaining its operation to Congress."

At the request of the Fifth Circuit, the present Attorney General filed an *amicus* brief before the *en banc* Fifth Circuit that said the following: "[T]he United States has consistently interpreted the coverage language of Section 2 and the almost identical language in Section 5 to apply to the election of all judges" Supplemental Brief for the United States as *Amicus Curiae*, filed June 1990, in 90-8014, *LULAC, et al. v. Mattox, et al.*

Contrary to *Sheffield*, the *en banc* Fifth Circuit dismissed the view of the Attorney General that Section 2 of the Voting Rights Act covers judicial elections. With no analysis, the majority characterized the Attorney General's opinion as one of a "scatter of birdshot contentions," 914 F. 2d at 630. (Pet. App., at p. 30a.) The Sixth Circuit, however, accorded due recognition to the view of

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[10] Although not concerned with judicial elections, the Eleventh Circuit agrees that "[n]owhere in the language of Section 2 nor in the legislative history does Congress condition the applicability of Section 2 [of the Voting Rights Act] on the function performed by an election official." *Dillard v. Crenshaw County*, 831 F. 2d 246, 250 (11th Cir. 1987).

the Attorney General that Section 2 of the Voting Rights Act applies to judicial elections. *Mallory v. Eyrich*, 839 F. 2d 275, 281 (6th Cir. 1988).

4. Irrelevance of the Non-Applicability of the One-Person, One-Vote Rule.

The *en banc* Fifth Circuit cited reapportionment cases that held that one-person, one-vote rules do not apply to the judiciary, 914 F. 2d at 626, n. 9. (Pet. App., at pp. 16a-17a), relying upon *Wells v. Edwards*, 347 F. Supp. 443 (M. D. La. 1972), *aff'd*. 409 U. S. 1059 (1973). Those cases dealt with malapportionment based upon population, and did not construe the Voting Rights Act. Whatever distinction that can be drawn between the judicial and legislative branch for numerical reapportionment, no such distinction can be attributed to the coverage of the Voting Rights Act. Even the Fifth Circuit conceded that prior to its amendment in 1982, the Voting Rights Act applied to the judiciary. (Pet. App., at 12a.)

The correct interpretation is by the Sixth Circuit in *Mallory, supra*: the Voting Rights Act is intended to remedy all discrimination in voting, and the 1982 amendments were intended to expand the Act, not restrict it. That Court relied upon the definition of "voting" in the Act itself, 42 U. S. C. 1973 l (c)(1). As a result the court determined that judges were "candidates for public . . . office," and, therefore, the system under which they are elected is subject to a dilution claim under the Voting Rights Act. As this Court has held, the legislative history is the authoritative source for ascertaining Congress' intent in amending the Voting Rights Act, *Thornburg v. Gingles*, 478 U. S. at 43, n. 7. In accord, the Sixth

Circuit noted that the terms "representatives," "candidates," and "elected officials" are used interchangeably throughout the text of the Senate Judiciary Committee Report.[11] As a result, the Sixth Circuit determined that "there is no basis in the language or legislative history of the 1982 amendment to support a holding that use of the word 'representative' was intended to remove judicial elections from the operation of the Act," *Mallory v. Eyrich*, 839 F. 2d at 278-281.

The Sixth Circuit specifically rejected the analysis later employed by the Fifth Circuit. The Sixth Circuit found that one-person, one-vote principles address an equal protection problem under the Fourteenth Amendment, whereas analysis of a Section 2 claim involves the construction of an act of Congress outlawing racial discrimination in voting. *Mallory v. Eyrich*, 839 F. 2d at 277-278.

The majority of the Fifth Circuit held that vote dilution claims were based upon one-person, one-vote principles, and therefore, if the former did not apply to the judiciary, then neither could the latter. 914 F. 2d at

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[11] a. *Senate Report No. 417*, at 16: "elected officials;"

b. *Ibid.*, at p. 28: "Section 2 protects the right of minorities to elect candidates of their choice;"

c. *Ibid.*, at p. 30: "opportunity to . . . elect candidates of their choice;"

d. *Ibid.*, at p. 31: " . . . elect candidates of their choice;"

e. *Ibid.*, at p. 67: " . . . elect candidates of their choice;"

f. *Ibid.*, at p. 193: Additional Views of Senator Dole: " . . . equal choice of electing candidates of their choice."

627-628. (Pet. App., at pp. 20a-24a.) However, the concurrence argued that vote dilution cases against the judiciary are not precluded by one-person, one-vote principles. It reasoned that racial and non-racial acts by the state that deny voting strength are not legally the same: one is facially neutral in the matter of race and the other rests on the need to prevent the submergence of the voting strength of minorities by the combined force of bigotry and election methods. 914 F. 2d at 643. Higginbotham, concurring. (Pet. App., at pp. 80a-82a.)

The inconsistency of the majority in the Fifth Circuit is illustrated by its recognition that Constitutional claims of dilution in judicial elections are still valid. As early as 1980, the Fifth Circuit held that a constitutional challenge based on racial discrimination may be alleged against the election scheme of city and state judges in Baton Rouge. *Voter Information Project v. City of Baton Rouge*, 612 F. 2d 208 (5th Cir. 1980). Plaintiffs had sued claiming that the at-large scheme for electing city judges and state judges diluted the voting strength of black voters in violation of the Constitution. In reversing a summary dismissal under Rule 12(b)(6), Judge Brown wrote that the fact that a dilution claim involved judges made the claim no less important and no less deserving of constitutional protection. If the one-person, one-vote principle is the basis of minority vote dilution claims, then logic requires that it be the basis of both statutory and constitutional claims. In addition, while the one-person, one-vote rule does not apply to elections for water storage districts, *Salyer Land Co. v. Tulare Lake Dist.*, 410 U. S. 719, 722 (1973), and constitutional conventions, *Driskell v. Edwards*, 413 F.

Supp 974 (W. D. La. 1976), *aff'd.*, 425 U. S. 956 (1976), minority vote dilution claims have been brought to prevent racial discrimination in the elections of members of those bodies. *Leal v. San Antonio River Authority*, CA No. SA-85-CA-2988, (W. D. Tex. 1985)

5. Summary.

By ignoring the teachings of *Haith* and now *Brooks*, the intent of Congress, and the interpretation of the Attorney General, the Fifth Circuit's *en banc* ruling carves out an exception to the coverage of the Voting Rights Act that will deny thousands of minority voters an equal opportunity to vote for judges of their choice in an election system free of discriminatory elements. If the decision of the Fifth Circuit is allowed to stand, then the law will be that discrimination in voting will not be tolerated, *except in the election of judges*.

The majority opinion has ignored the true meaning of the Voting Rights Act. The struggles for the vote, and for the effective vote, have been long and bloody. There is no legal reason to read the Act to prevent minority voters from casting effective ballots for judges of their choice. If the efforts that resulted in the adoption of the Fifteenth Amendment and the host of Civil Rights Acts are not to be halted, then the majority opinion must be reversed. This Court is called upon to correct such a blatant denial of minority voting rights and to effect the will of Congress that the nation's electoral systems be free of discrimination.

II.

Section 2 of the Voting Rights Act Covers Elections for All Judges, Not Just Appellate Judges

Although the majority of the Fifth Circuit held that Section 2 of the Voting Rights Act does not apply to judicial elections, the concurrence of Judge Higginbotham makes only a slightly less damaging attack upon the Act. This position cannot be accepted as a compromise between coverage and non-coverage.

The concurrence, 914 F. 2d. at 634-651, (Pet. App., at pp. 47a-114a), would hold that the election of Texas trial judges cannot violate Sec. 2 of the Voting Rights Act, 42 U. S. C. 1973, because these judges hold single-member offices. It defined a single member office as one in which the "full authority of that office is exercised exclusively by one individual." (Pet. App., at p. 102a).

The holding is wrong for several reasons.

- The applicability of the Voting Rights Act is not determined by the nature or function of the office to which persons may be elected.

- The holding failed to follow the analysis of *Thornburg v. Gingles*, 478 U. S. 30, (1986), which requires a consideration of the "totality of the circumstances."

- The holding erroneously elevated two of the minor "Senate factors," responsiveness and tenuous state policy, to a threshold level.

- The holding confuses remedy considerations with liability considerations.

1. Nature and Function of the Office.

The concurrence recognized the wisdom of the earlier panel decision in *Chisom* which held that Section 2 of the Voting Rights Act applies to judicial elections. 914 F. 2d at 645, (Pet. App., at 90a). In the face of a challenge that judges are not "representatives," Judge Johnson, writing for the panel in *Chisom*, 839 F. 2d at 1060, quoted with approval the holding of the Eleventh Circuit in *Dillard v. Crenshaw County*, 831 F. 2d 246, 250 (11th Cir. 1987):

> Nowhere in the language of Section 2 nor in the legislative history does Congress condition the applicability of Section 2 on the function performed by an elected official.

While acknowledging that the legislative history to the 1982 amendments to Section 2 specifically refers to "judicial districts" 914 F. 2d at 639, (Pet. App., at 59a-68a), the concurrence creates an exception for trial judges out of whole cloth by holding that trial judges occupy single-member offices that are not divisible for purposes of the Voting Rights Act.[12] The opinion refutes the notion that judicial elections are to be excluded from coverage, and then proceeds to take a course that leads to that exact result for trial judges. The opinion bases this exception on

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[12] Judge Johnson in his dissent to the original panel decision, *LULAC v. Clements*, 902 F. 2d. 293, 313, note 11, demonstrates that the reasoning of the concurrence is flawed. The concurrence attempts to avoid the holding of *Haith v. Martin*, 618 F. Supp 410 (E. D. N. C. 1985) *aff'd. mem.*, 477 U. S. 901, 106 S. Ct. 3268 (1986) by alleging a distinction between Section 2 and Section 5 of the Voting Rights Act, while elsewhere discounting such a distinction.

language in *Butts v. City of New York*, 779 F. 2d 141 (2d Cir. 1985), which held that a single-member office, such a mayor, comptroller, or council president, cannot be further divided. The single-member offices in *Butts*, however, were singular within a geographic area. For example, there is only one mayor for the City of New York. The argument of the concurrence is that the hallmark of a single-member office is the fact that the full authority of the office is exercised exclusively by one individual. (Pet. App., at 102a). By emphasizing decision making authority rather than a single office within a geographic area, the concurrence mischaracterized trial judges in Texas as single-member office holders. The error is obvious. For example, in Harris County there are 59 judges with exactly the same authority.[13]

In addition, *Butts* was decided incorrectly.[14] At issue there was whether the 40% majority run-off requirement for mayor, comptroller, and city council president, all single-member offices, violated Section 2 of the Voting Rights Act. *Butts* at 148-149. Even though the majority there stated "[w]e need not determine whether such opportunity could ever be denied in the context of an

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[13] The offices of trial judges in Texas are fungible. All have exactly the same authority. *Texas Constitution*, Art. 5. Sec. 8; *Tex. Govt. Code* Sec. 24.007.

[14] A panel of the Eighth Circuit agreed with the dissent in *Butts*. *Whitfield v. Democratic Party of the State of Arkansas*, 890 F. 2d 1423, 1432, footnote 3 (8th Cir. 1989), vacated and decision of district court to the contrary aff'd by equally divided court, *en banc*, 902 F. 2d. 15 (8th Cir. 1990), *cert. denied*, No. 90-383. It is significant that both *Whitfield* and *Carrollton Branch of NAACP v. Stallings*, 829 F. 2d 1547 (11th Cir. 1987), which correctly consider the intent of Section 2, are post-*Gingles* decisions, while *Butts* is pre-*Gingles*.

election to a single-member office," the decision erred by failing to take into account the intent of the Voting Rights Act: to protect or prevent impairment of the right of minorities to cast an undiluted vote for the candidate of their choice without regard to the office being voted upon. Fashioning a single-member office exception was not necessary to a decision. In *Butts*, the issue was the effect of the run-off requirement, not the nature of the office to which it was applied. As pointed out by the dissent there, various devices can inhibit participation, one of which could be a run-off requirement. While no share of a geographic single-member office may be possible, minorities do "have a right not to be subject to any structural process that deprives them of equal opportunity to field a candidate for one of those offices." *Butts*, 779 F. 2d at 155.

Even if *Butts* was correctly decided, it is not applicable here. The distinction has been extensively analyzed and rebutted by the trial court in *Southern Christian Leadership Conference v. Siegelman*, 714 F. Supp. 511, 518-520 (M. D. Ala, N. D. 1989). The underpinning of the decision is capsulized in footnote 19:

> The *true* hallmark of a single-member office is that only one position is being filled for an entire geographic area, and the jurisdiction can therefore be divided no smaller. While mayors and sheriffs do indeed "hold single-person offices in Alabama," they do so because there is only one such position for the entire geographic areas in which they run for election. . . . [W]hat is important is how many positions there are in the voting jurisdiction. It is irrelevant, in ascertaining the potential existence of vote-dilution,

> that these officials happen to exercise the full authority of their offices alone.

The rationale of the *Butts* exception is that a single-member district cannot be shared, or stated otherwise, no remedy is possible.[15] Judge Dubina recognized in *S.C.L.C.* that in these multi-judge districts "splitting the jurisdiction into two or more districts is not only possible, but can 'secure [to a minority class] a share of representation equal to that of other classes.' *Butts*, 779 F. 2d at 148." *Southern Christian Leadership Conference v. Siegelman*, 714 F. Supp. at 519, n. 24. These types of judicial offices have been correctly characterized as "designated seats in multi-member districts." *Haith v. Martin*, 618 F. Supp 410 (D. C. N. C. 1985), *aff'd mem.* 106 S. Ct. 3268 (1986). *Haith* was correct. *Butts* does not apply.

Moreover, trial judges in Texas do not act alone in fulfilling their judicial duties. Not only do they regularly substitute for each other, there is a system of "visiting judges" which allows retired judges to hear aspects of any particular case. And as admitted by the concurrence, 914 F. 2d 647, (Pet. App., at 96a-98a), judges act together in many rule making and administrative activities. These activities are a part of a judge's duty. There is no ability under state law to separate them, and, likewise, no reason under the Voting Rights Act for them to be separated,

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[15] *United States v. Dallas County Commission*, 850 F. 2d 1430, 1432, note 1, is of no help to the concurrence. In that case *there was only one probate judge in Dallas County*. Plaintiffs did not challenge any county exclusively served by only one court.

with some counting and some not counting in a liability determination under Section 2.[16]

2. Gingles Analysis.

The concurrence failed to follow this Court's analytical framework for evaluating vote dilution claims. *Thornburg v. Gingles*, 478 U. S. at 50-51. The basis of a Section 2 claim is that certain electoral characteristics interact with social and historical conditions to create an inequality in the minority and majority voters' ability to elect their preferred candidates. Review of all Senate factors is relevant, but most important is a finding of racially polarized voting and lack of minority electoral success. *Id.*, at 48, note 15.

3. Over Emphasis of Minor "Senate Factors".

The concurrence has seized upon two relatively minor issues, tenuous state policy and responsiveness, as underpinnings of its analysis. In so doing, the concurrence incorrectly elevated "the additional factors" of the listed Senate factors, *Senate Report*, at 206-207, to a threshold status ahead of the three *Gingles* factors and the "totality of the circumstances."

The Senate factors, other than polarized voting and extent of the election of minority officials, have been held

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[16] Both *Westwego Citizens for Better Government v. City of Westwego*, 872 F. 2d 1201 (5th Cir. 1989) and *Dillard v. Crenshaw County, Alabama*, 831 F. 2d 246 (11th Cir. 1987) refused to allow the various functions of the officials at issue to be separated out for purposes of a liability determination under Section 2.

to be supportive of but not essential to a plaintiff's vote dilution claim. *Gingles* at 48, note 15.

a. State's Interest in At-large Elections.

The concurrence argues that the state's interest in its structural arrangement of election of judges[17] by definition prevents voter dilution claims even when judges are elected at-large in majority white counties. 914 F. 2d at 651, (Pet. App., at 112a-114a). This foreclosing conclusion is reached without any consideration of the "totality of the circumstances" as mandated by *Gingles*.

Whether or not the state has a compelling interest in at-large elections for trial judges should be considered as a part of the totality of circumstances analysis under the rubric of whether the state's interest is tenuous. *Senate Report*, at 206-207, states:

> whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

The district court found as a part of its "totality" analysis that there was no compelling state interest in the current at-large scheme. (Pet. App., at p. 283a.)

There is substantial doubt that the State of Texas has *any interest* in continuing at-large judicial elections by

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[17] The concurrence's statement that "[w]e are persuaded that Texas has a compelling interest in linking jurisdiction and elective bases for judges acting alone" is factually inaccurate. As demonstrated below, jurisdiction is statewide and elective base is countywide.

county. The state constitution specifically allows creation of judicial districts smaller than a county. *Tex. Const.* Art. V, Sec. 7a. The district courts exercise jurisdiction statewide, *Nipper v. U-Haul Co.*, 516 S. W. 2d 467 (Tex. Civ. App. 1974), although the judges are elected from a sub-district of the state, which historically has been the county or counties. Justice of the Peace courts are elected from sub-districts within a county, but have countywide jurisdiction. *Tex. Const.* Art. V, Sec. 18 & 19. *Tex. Govt. Code*, Sec. 37.031, Jurisdiction.

b. Responsiveness.

Additionally, in recasting the interest of minority voters and minority litigants in terms of having their policy interests reflected in judicial decisions rather than in terms of removing impediments to the minority voters' right to cast an effective vote, the concurrence has improperly elevated the other additional factor, "responsiveness," to a threshold level, rather than relegating it to its proper level. "Unresponsiveness" is no longer a necessary part of a plaintiff's case. *Rogers v. Lodge*, 458 U. S. 613, note 9 (1982); Congress has expressly disapproved excessive reliance on responsiveness. *Senate Report*, at 207, note 116.

Finally, the suggestion that "judges must be 'accountable' to litigants is an affront to the Texas judiciary." 914 F. 2d at 667, Johnson, dissenting. (Pet. App., at p. 170a.)

4. Confusion of Remedy and Liability Considerations.

The question of whether district judge offices can be sub-districted based on their supposed "sole decision

making authority" is not a basis for denying Section 2 liability. The question of sub-districting relates to remedy. When a state adopts a remedy, it may consider sub-districting along with other remedial possibilities that will satisfy the concerns Judge Higginbotham has about any state interests in keeping electoral base tied to a judge's normal area:

- Elimination of majority vote requirements
- Elimination of numbered posts
- Elimination of anti-single shot requirements
- Limited voting
- Cumulative voting
- Smaller than single county districts, with judges normally hearing cases only from those districts (yet being able to help out with overload from adjoining districts).

As stated by Judge Johnson in his dissent, 914 F. 2d at 669, note 33, (Pet. App., at p. 175a, note 33):

> Once again, the concurrence's asserted concern is premised on the anticipated remedy – subdistricting. While the Supreme Court, in *Gingles*, did indicate that a "single-member district is generally the appropriate standard against which to measure minority group potential to elect," it did not mandate the imposition of sub-districts to remedy every instance of illegal vote dilution. The concurrence, by erroneously factoring in, at the liability phase, concerns which may never be borne out, refuses to properly acknowledge the intent of the Voting Rights Act.

5. Summary.

In summary, Congress has expressed its intent to eradicate all discriminatory electoral devices. The concurrence has focused upon the function of the elected official and the duties and powers of the judicial office. It has disregarded the analysis under the *Gingles* factors. It has misused the minor "Senate factors," and has confused remedy and liability considerations. This flawed analysis resulted in a conclusion that there is "sole-decision maker" exception to claims of minority vote dilution in majority white, at-large election schemes. To approve this exception would frustrate the intent of the Voting Rights Act.

CONCLUSION

For the above reasons, this Court should reverse the *en banc* decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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